No. 77-19

Supreme Court of the United States

October Term, 1977

IN RE BOSTON & PROVIDENCE
RAILROAD CORPORATION,
Debtor,

ARMISTEAD B. ROOD,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The Penn Central brief would rewrite the Court of Appeals decision six months after the event. The brief imaginatively suggests why the Court of Appeals *might* have issued summary threshold dismissal – not jurisdictional grounds but approaches which do not emanate from (and probably never occurred to) that court. It will not do.

(a) The petitioner and the Supreme Court are entitled to know the court's legal grounds from a reasoned statement of the Court of Appeals itself – as *the indispensable basis of informed judicial review* and as responsible findings of an accountable tribunal. *United States v. Merz*, 376 U.S. 192, 199 (1964).

(b) The Court of Appeals must have reached any valid decision by fair procedure without entrapment.

"Fairness of procedure is due process in the primary sense." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951), citing *Brinckerhoff-Faris*, see Petition 12, 17.

(c) A party is entitled to be *heard* before decision on a new theory. *Phillips v. Crown Central Petroleum Corp.*, 556 F.2d 702, 705 (C.A. 4, 1977).

Was there an appealable 1974 judgment of the district court? It is a question of procedural regularity. Civil Rule 58 as amended rules out guesswork and applies in this case. *Matter of Morales*, 553 F.2d 1192 (C.A. 9, 1977)

A. The court's indispensable reasoned statement of legal grounds for dismissal is totally lacking

The defect extends to every question presented below. Compare the questions (Q.1 through Q.8 appended to Wolfe brief) with the court's orders (Petition 2a-8a).

Q.1-5 *On holding the expense fund to protect the stockholders from fiduciary breach by the Penn Central trustees.* The court summarily dismissed the questions for lack of substance, without explanation. See Wolfe brief 5, Petition 13 note 2.

Q.6 *On prior claims for allowances* (pending or inchoate). The court dismissed, then recanted – but adhered to summary dismissal of the pending unadjudicated success claims, shifting from one reason to another, finally stating that no injustice was being done. (Petition 8-13.)

Q.7 *On Penn Central's agreement not to molest the fund.* The court summarily dismissed *sub silentio.*[1]

Q.8 *On referral to a special master.* The court summarily dismissed *sub silentio.*

B. Every ground of dismissal asserted by the Court of Appeals is improper.

1. *There was no 1974 appealable order.* The Penn Central brief admits (p. 4) that the district court's order for 1974 hearing on allowances omitted Mr. Rood's pending petitions. Only the district court could adjudicate his

[1] The Penn Central brief errs (p. 8 note 9) in denying agreement for petitioner Rood's claims to lie in abeyance. See the Hally letter (Petition 11a). Question 7 below referred to broader agreement of the PC trustees not to disturb the fund, in consideration of Mr. Rood's waiving his rights against another fund. PC Washington counsel did not participate in that agreement or in the long negotiations to settle.

petitions. It has not done so. (There have been long negotiations.) The last court order on his petitions for allowance came in June 1973, when Judge Ford (the B&P reorganization judge until 1974) issued a special order (which Penn Central opposed) referring Mr. Rood's 1973 Second Supplemental Petition for a success allowance to the I.C.C. for its recommendation (which is no longer needed).[2] The district court has not adjudicated any petition of Mr. Rood for an allowance since 1969.

No profert of an order of adjudication has ever been made. No such order has been exhibited to (or by) the Court of Appeals.

2. *The courts knew that there was no appealable order.*

(a) The district court had judicial knowledge of its own record in the proceeding.

(b) In the 1974 appeal the Court of Appeals described Mr. Rood's pending petitions for allowances, including his 1971 petition for $150,000 and his Second Supplemental (success) Petition for $453,000.[3] *In re B&P,* 501 F.2d 545, 547 (July 17, 1974, clarified by memorandum October 18).

[2] The I.C.C. purported to "dismiss" the petition summarily, at Penn Central's request. That is one of the legal errors shown in Mr. Rood's pending objections of 1974 to the district court. Only Judge Ford could dismiss the petition legally.

Today he would refer it to one of the panel of special masters of the district court for railroad reorganization problems.

[3] Calculated as 5 per cent of the 1973 B&P Stage Two realization of $12,000,000 – less $147,000 interim compensation allowed to Mr. Rood and his colleagues in 1969.

(c) At the 1976 hearing before Judge Caffrey, Mr. Rood said:

> "I am glad Mr. Bartlett [the B&P trustee] is here. Meanwhile, it might be in order – I think it would be in order – for the Court to ask the B&P Trustee, or, if he feels barred by conflicts of interest, then his counsel, Mr. Charles W. Mulcahy, who is fully informed, *to make a report to the Court on what, in their opinion, should be done about our petitions for allowance.* (Hearing, May 3, 1976, Tr. 16, emphasis added.)

(d) In their October 1976 Opposition to Summary dismissal in the Court of Appeals, the Development Group appellants (including Mr. Rood) pointedly argued –

(i) Their reservation of the success factor in their petitions of 1966 and 1971 (pp. 15-16).

(ii) Judge Ford's acceptance of the success reservation (shown by his referral of the 1973 success petition to the I.C.C.).

(iii) The refusal of all tribunals to recognize a success factor when passing upon the petitions of 1966 or 1971 – on the ground that success had not yet materialized and that recognition would be premature.[4]

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[4] Even in 1972 the I.C.C. examiner found the prospects for the B&P sale to Massachusetts very doubtful. I.C.C. F.D. 12131, B&P Reorganization. Report Recommended by Examiner Dodge August 24, 1972, sheet 31.

Mr. Rood's 1969 allowance order recognized 452 weeks of at least 40 hours. The $90,000 award (at 40 hours weekly) came to $4.98 per hour. That *interim* rate did not reflect any success.

(iv) *The pendency of the 1974 Second Supplemental Petition for allowance in the district court* (p. 17).

All of this was argued in light of

(v) The equity standard of allowances. *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939) and on remand 110 F.2d 714 (C.A. 1, 1940). See Dawson: *Lawyers and Involuntary Clients: Attorney Fees from Funds,* 87 Harv. L. Rev. 1597, 1609 ff, 1653 (June 1974).

(vi) The right to a hearing on final allowances. The law of equitable reorganization allowances requires such an opportunity. Only at the end of the proceedings can the court appraise the actual success and benefits and award compensation accordingly. Until then allowances are only *interim* – provisional and tentative. See *6A Collier on Bankruptcy* (14th ed.) ¶13.16, p. 1009. The parties herein await the final call for petitions for allowances.

C. Petitioner Rood did inform the Court of Appeals of the pendency of his success petition, in the Opposition to Summary Dismissal, October 25, 1976, before the Court's first order.

See this statement in his October Opposition:

> "*The second supplemental petition* of Mr. Rood followed the realization of the proceeds from the grand B&P sale to Massachusetts. It was filed in June, 1973. Judge Ford accepted it and forwarded it to the Commission.
>
> "The Commission has not heard it. This petition is founded on the *Ticonic* case." (p. 17)

D. In dismissing the appeal for supposed lack of the above statement the Court of Appeals victimized petitioner Rood by again misreading the record

Every ground asserted for summary dismissal proves unfounded.

1. There was no 1974 judgment on Mr. Rood's petitions.

2. He could not have appealed without a judgment, under Civil Rule 58.

3. He did not waive his claims by not appealing from the unappealable.

4. He should not be penalized by forfeiture for not anticipatorily saving the court from unforeseeable *sua sponte* errors.

5. He did inform the court that his petition for success allowance was pending, before the court issued its first ruling.

6. Mr. Rood fully complied with First Circuit Rule 15, carefully explaining that he could not have anticipated the Court's first misreading. His pleadings were all timely under the Appellate Rules.

7. The Court's final ground, that no injustice is being done, is no sufficient ground. It only begs the question of propriety and refuses to disturb an irregularly reached *status quo* of summarily dismissal.

E. The lack of a reasoned statement of grounds is a deprivation of due process

When a court reaches a decision on erroneous factual bases, and then precludes the victim from being heard in order to correct those errors, it withholds procedural due process in an aggravated manner.

It frustrates petitioner Rood from obtaining a sufficiently informed Supreme Court decision of the certiorari question now pending.

The Court of Appeals held petitioner to an impossible standard of "clairvoyant anticipation". *Halpern v. Schwartz*, 426 F.2d 102, 105 (C.A. 2, 1970). *Williams v. Ward*, 556 F.2d 1143, 1154 (C.A. 2, 1977). Even if formal findings of fact are not mandatory, some reasonable explanation is necessary. *Huckeby v. Frozen Food Express*, 555 F.2d 542, 545 (C.A. 5, 1977).

It is error to decide on a new ground without first giving the parties an opportunity to be heard. *British Airways Board v. Port Authority of New York*, 558 F.2d 75, 82 (C.A. 2, 1977); *Olivares v. Martin*, 555 F.2d 1112, 1196 (C.A. 5, 1977); *Fruges Heirs v. Blood Service*, 506 F.2d 841, 844 note 2 (C.A. 5, 1975) thus –

> "The underlying assumption of this proposition is, of course, that the parties had a full and fair opportunity to develop facts relevant to the decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance but remand."

Cf. *Fountain v. Filson*, 336 U.S. 681, 683 (1949).

Battle fatigue with reorganization does not warrant rationing justice or countenancing procedural irregularity extending to the extreme of deciding without hearing – setting up shielded propositions advanced by the court in its dispositive order before counsel had a chance to test and challenge them in the traditional adversary way. *Sears Roebuck & Co. v. General Services Admin.*, 553 F.2d 1378, 1382-3 (C.A.D.C., 1977).

But the First Circuit is no stranger to honorable amends. *Cochran v. M. & M. Trans. Co.*, 110 F.2d 519, 523 (C.A. 1, 1940).

F. Timeliness

Timeliness is not jurisdictional. The Clerk properly received the Petition on July 2 under Mr. Justice Brennan's order extending the time until July 24. His extension was discretionary. *Durham v. United States*, 401 U.S. 481 (1971); *Taglionetti v. United States*, 394 U.S. 316 (1969).

The imperial Penn Central Wreck is our most shocking financial disaster. As its undertakers and their established lawyers contemplate its ruin, they would do well to stop opposing procedural due process for little B&P. Their turn will come. The B&P Development Group has honorably saved one row in the devastated vineyards. Will they do as well?

CONCLUSION

The Supreme Court should remand the proceeding to the Court of Appeals –

either for

(1) a detailed statement of grounds for its decision (if the lower court believes that the supporting facts are adequate and the decision one to which it will otherwise adhere),

or (2) for reconsideration,

or (3) for plenary argument upon withdrawal of the present summary dismissal.

Respectfully submitted,

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